Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 93-25
	)	
Direct Broadcast Satellite Public Service Obligations	)	

COMMENTS OF CONSUMER FEDERATION OF AMERICA

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I. Introduction

The Consumer Federation of America (CFA)[1] hereby submits these comments in response to the above-referenced Notice of Proposed Rulemaking on Direct Broadcast Satellite Public Service Obligations ("Notice"). CFA and its members played an active role in promoting passage of "the Cable Television Consumer Protection and Competition Act of 1992" ("the 1992 Cable Act")

II. Who is Ultimately Responsible for Meeting the Public Service Requirements

CFA agrees with the Commission that the 1992 Cable Act intended to place public service obligations only on DBS services provided in the Ku-band. The definition of provider of direct broadcast satellite service found at §335(b)(5)(A) is limited to licensee's of Ku-band satellite systems. The legislative history offers no additional information, so the plain language of the statute operates.

The Commission's conclusion in the Notice at paragraph 8, that the licensee under Part 100 should be ultimately responsible for meeting the public service obligations contained in the 1992 Cable Act is correct. This is critical if the Commission is to be in a position to enforce these important public interest obligations.

The scenario should be no different for those Part 100 licensees that do not actually provide the programming for themselves. The 1992 Cable Act places the burden of carrying out the public interest obligations squarely on the shoulders of the direct broadcast satellite service provider.[2] The service provider is "...a licensee for a Ku-band satellite

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[2]See; § 335(a)(The Commission must "...impose, on providers of direct broadcast satellite service, public interest or other requirements...")

system...(emphasis added)."[3]

In cases where a licensee delegates programming decisions to another entity, the public service obligations should be treated as any other contractual issue between a licensee and a programmer. In either case, the licensee should have the ultimate responsibility for meeting these obligations. This will help the Commission avoid finger pointing between a licensee and program provider if the public interest requirements are not met. Furthermore, knowing what entity is ultimately responsible in all instances makes it easier for a noncommercial educational programmer to rectify any disputes. In the alternative, a licensee may wish to retain the programming responsibility for its public interest requirements to avoid any future problems.[4]

With respect to a DBS provider that uses a Ku-band fixed service satellite system licensed under part 25 of title 47 of the Code of Federal Regulations, the licensee or the DBS provider should be responsible for meeting these standards. Since the

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[3]§ 335(b)(5)(A)(i).

[4]Since a licensee could choose to give the public service responsibility to the programmer, it would be to the benefit of the licensee to provide in the contract that failure to meet any public service obligations transferred to the programmer is grounds for cancellation of the contract or some other penalty. This would enable the licensee to take the steps necessary to fulfill its obligations itself where necessary. In this type of situation, the licensee should be given reasonable time to rectify the problems and begin airing the noncommercial educational programming.

nature of the satellite under this part is somewhat different than a part 100 satellite, the Commission should retain authority

effective date of the Commission's regulations. This is a strained reading of the statute.[6] The plain language of the statute requires that the Commission condition "any provision, initial authorization, or authorization renewal" of DBS video programming service upon setting aside between four and seven percent of channel capacity for the use of noncommercial educational programmers.[7]

[redacted]

Commission licensees and others under the Commission's authority

In defining a channel for purposes of this section of the 1992 Cable Act, CFA believes it would be imprudent to use a transponder as the measure. Channel compression technology is in great flux. As the technology progresses, it is quite likely that the number of channels offered on a single transponder will increase significantly. The Commission should not put a system in place that may encourage DBS providers to avoid bringing technological advancements to some transponders (those used by noncommercial educational programmers) while bringing them to others.

To permit the Commission and noncommercial educational programmers to keep up with the advancements of technology, a channel should be defined as bandwidth sufficient to carry a signal that, after decompression and decoding, is equivalent to one NTSC video and audio channel. Using this approach, the percentage of channels devoted to the public interest requirements can easily be re-calculated annually to reflect changes in video compression and similar technolgy. Furthermore, this is the most commercially recognizable standard for the public, which will help to make the noncommercial educational programming services a viable portion of the DBS programming package.

Defining the number of channels by the number of 24MHz wide channels for part 100 licensees and 30-36 MHz for part 25

providers, as suggested in paragraph 13 of the Notice, is far too shortsighted. It appears that DBS providers will deliver their programming in encoded forms using digital compression technology. The intent of Congress in §335 is to make noncommercial educational programming available to DBS viewers. If this intent is to be effectuated, the noncommercial programming must be delivered using the same encoding and encryption technology as commercial DBS programming. If this is not done, consumers may have to buy one set of reception equipment for commercial programming and another for noncommercial programming.

Given this inextricable technical relationship, noncommercial programming offered in satisfaction of §335 requirements will have to be compressed, encoded and probably uplinked in common with a DBS provider's commercial programming. CFA believes segregating noncommercial programming on a separate transponder creates an unacceptable risk of technical incompatibility with commercial programming and with receiving hardware. This risk exists both at the time of initial launch of the service and in the future as the technology evolves.

CFA believes defining channel capacity as NTSC-equivalent channels and requiring integration with the DBS provider's compression and encoding systems creates the proper flexible framework for implementing §335. This approach will remove some

of the incentives to discourage use of noncommercial capacity.

The Commission's conclusion at paragraph 17 of the Notice that a distributor need not also be a part 25 licensee to be implicated by the definition of "provider of direct broadcast satellite service"[10] is correct. In some instances, the public interest obligations should be with the distributor because of the nature of the satellite and because the distributor is the party that controls or selects the programming. The Act is quite clear on this point.[11]

B. Defining the Number of Channels Which Must be Devoted to Noncommercial Educational Programming on a Particular System

The Commission seeks to determine the number of channels devoted to noncommercial educational programming that can be used without hurting the viability of DBS service. This is a serious concern shared by CFA. We are hopeful that DBS service can bring significant competition to monopoly cable television markets and we do not want to jeopardize the viability of this service in its infancy. However, it would not appear that even 7% of capacity would be threat to the viability of DBS service. CFA believes our proposal regarding the amount of capacity that must be designated for noncommercial educational programming (See;

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[10] § 335(b)(5).

[11] Id.

Appendix A) would not jeopardize the economic viability of DBS.

CFA recognizes that the Commission must retain some flexibility to make certain that the DBS service launch proceeds unimpeded. Therefore, if a DBS service launch will be delayed as a result of the noncommercial educational programming capacity requirements, the Commission should have the authority, upon proper showing by the service provider and opportunity for public comment, to reduce the public interest requirement to the 4% minimum.[12] The Commission would then ratchet up amount of capacity to reach its peak level no later than 5 years after launch.[13] To receive such a reduction, the DBS service provider must cancel its launch reservations and be able to document a delay in launch caused by the public interest requirements.

The Commission must next decide whether the percentage of noncommercial educational programming is offered as an overall percentage of program time or as a number of discrete channels. It is to the benefit of the licensee, commercial programmer and noncommercial educational programmer for the Commission to create regulations which enable a noncommercial educational programmer to build viewership and develop the programs into an asset to the

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[12]CFA believes the Commission does not have the authority to permit licensees or providers to offer less than 4% of capacity for noncommercial educational programming or to delay implementation of this requirement altogether.

[13]5 years is an adequate amount of time for the DBS service to become viable.

system. To that end, CFA believes noncommercial capacity should be set aside as discrete channels rather than a percentage of programming time.[14]

It may be that some noncommercial educational programmer would not be in a position to offer a full days schedule of programming. To meet these goals, noncommercial educational program time must be sold in hour and half-hour time slots. A single noncommercial programmer should be permitted to buy a block of programming time up to one full channel. A system of regulation must be implemented which does not allow noncommercial educational programming to be relegated to low viewership times as nothing more than filler for what would otherwise be dead time on the system. A system which does not promote noncommercial educational programming in a viable manner would defeat Congress' intent.

The Commission, a paragraph 40 of the Notice, states that it believes Congress envisioned a sliding scale to determine the number of noncommercial channels for a particular system. From the Conference Report, that conclusion appears to be well founded.[15] CFA agrees that a sliding scale is appropriate and

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[14]Those systems with the smallest capacity would designate an appropriate portion of the programming day on a single channel for noncommercial programming.

[15]See; H.R. Conf. Rep. No. 124, 102d Cong., 2d Sess. 1, 100 (1992). (...The four to seven percent reserve gives the Commission the flexibility to determine the amount of capacity to

we have attached our suggested scale at Appendix A. In the scale CFA advocates the minimum 4% requirement for the smallest capacity systems which would then ratchet up to the full 7% as capacity grows. We believe this approach best represents Congress' intent.[16]

The Commission raises the question of whether existing service contracts with programmers should be grandfathered. This would restrict noncommercial educational programmers from access to a DBS system until the contract had expired. There is no basis in the Act or it's legislative history for grandfathering any such programming agreements.

This exception would be especially bad in that DBS distributors and programmers are likely to make long term contracts for programming. This could keep noncommercial educational programmers off of a system for many years. CFA believes this was clearly not Congress' intent and we urge the Commission not to grandfather existing commercial programming contracts. All that is required is reasonable notice for removal of the commercial programming service in compliance with the law.

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be allotted." "...the Commission may determine to subject DBS systems with relatively large total channel capacity to a greater reservation requirement than systems with relatively less total capacity.")

[16] Id.

IV. Who Maintains Responsibility for Content and Compliance with FCC Rules

CFA believes it would be unreasonable to hold a licensee responsible for a noncommercial educational programmer's failure

Commission, based on the plain language of the Act and it's legislative history, to permit or require DBS providers to refuse carriage or restrict dissemination of any noncommercial educational programmer without express authority from Congress.[20]

Since CFA advocates an access policy of first come, first served for noncommercial educational programmers (See section V., *infra*), the rules that are applied to common carriers with regard to preventing illegal activities over their facilities[21] would be appropriate. The Commission does not have the authority and should not apply standards similar to those found in §10 of the 1992 Cable Act. Before undertaking any regulation based on program content, the Commission must consider the subscription nature of the DBS service and availablility of less restrictive means such as a "lock box".[22]

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[20]The scheme advocated in §10 of the 1992 Cable Act is both underinclusive and overinclusive. It has been challenged on constitutional grounds and has been enjoined by the D.C. Circuit, which indicates a substantial liklihood of success on the merits.

[21]See; Memorandum Opinion, Declaratory Ruling, and Order, Gen. Docket No. 83-989, 2 FCC Rcd 2819 (1987); and Humane Society v. Western Union International, Inc., 30 FCC 2d 711, 713 (1971).

In essence, the explicit lack of editorial control of the DBS provider makes this service a video common carrier for noncommercial educational programmers.[23] DBS is essentially licensed as a hybrid system. Parts are similar to broadcasting and others to common carrier. CFA believes the regulatory approach must reflect this fact by treating noncommercial capacity as a common carrier type service. This best reflects Congress' intent.

V. Who Qualifies as a National Educational Program Supplier and

this definition.[25] DBS operators and their affiliates should not be eligible to use noncommercial capacity unless there are absolutely no qualified noncommercial educational programmers available.

To that end, CFA believes the definitions found in Section 397 of the Communications Act of 1934[26] would be a useful guide to defining terms such as "public telecommunications entity"[27], "noncommercial telecommunications entity"[28] and "public telecommunications services"[29] with the broadth mandated by the

CFA believes that Congress intended the term "national" to be interpreted broadly in light of the goal of diversity in the Act.[30] To that end, a national educational program supplier should include any distributor of video programming that has distributed material to at least two different markets in this country. This broad definition is in line with the intent of Congress to make DBS available to a very broad constituency of noncommercial educational programmers, as evidenced through the channel capacity set aside and reduced noncommercial rates mandated in §335 of the Act.

The Commission asks for comment at paragraph 43 of the Notice on whether any corporate relationship between a DBS provider and program supplier should be considered when determining eligibility for noncommercial capacity. CFA believes the total ban on editorial control by the DBS service provider of this capacity mandates an absolute ban on any corporate relationship between the DBS operator and a qualified noncommercial programmer.[31] Concerns about editorial control, be it overt or subtle, cannot be overcome with a less rigorous restriction. Furthermore, the best way to encourage Congress' goal of greater diversity is to maintain this structural

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[30]See; §2(b)(1).

[31]This restriction on corporate relationships should not apply to qualified noncommercial educational programmers that are also DBS providers.

separation.[32]

CFA believes it would be to the benefit of both programmers and operators for the Commission to refrain from defining precisely what programming qualifies as noncommercial educational and informational in nature. CFA believes the rules regarding what programming noncommercial educational TV stations can air may be a helpful guide for the Commission, programmers and providers. But, because this is a different type of service, they should not be dispositive. Disputes should be settled by the Commission, after ample opportunity for public comment.

CFA believes that "use" of a reserved channel by a noncommercial program provider should be tied to signing of a contract with a programmer ready to provide programming. If a programmer is not prepared to make programming available at the time the contract is signed, the DBS operator should continue to have the authority to use the noncommercial capacity.

When the noncommercial programmer has programming available, the programmer should then give the DBS provider notice that it is ready to use the designated capacity. After receiving notice, the DBS operator should then take the necessary steps to make the capacity available no later than 60 days. This will keep channel

[32]This would not prohibit, of course, payment by a DBS operator to a qualified noncommercial programmer for the right to

capacity from being kept unused for any significant period of time or permitting delays in getting noncommercial programming on the system.

The Commission must also determine how access is granted to qualified noncommercial programmers. Access by qualified programmers should be based on a first come, first served basis from the date of delivery of the service request.[33] CFA believes this is critical to prevent a DBS provider from being able to exert any form of editorial control over the noncommercial educational programming.[34] If disputes develop regarding the qualifications of a noncommercial educational programmer for carriage or terms of the carriage agreement, the Commission should settle the disputes within 30 days after close of an opportunity for public comment.[35]

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[33]Those noncommercial programmers who are not capable of getting on the system within a reasonable amount of time, such as 90 days, should not be considered "qualified" for purposes of obtaining access.

[34]See; note 18 *supra*.

[35]This will help prevent a DBS provider who maintains a powerful bargaining position and who wishes to make it difficult for noncommercial programmers to gain access, from retaining the channel capacity for their own commercial uses. The Notice for public comment should be issued within 30 days.

VI. Reasonable Rates for Noncommercial Educational Programmers Under §335

A. The Basis for Reasonable Rates

In §335(b)(3), Congress gives the Commission the power to determine reasonable prices for amounts to be charged to educational programming suppliers, subject only to the factors set out in §335(b)(4).

At paragraph 48 of the Notice, the Commission asks for comment on whether the language in the Act which instructs the Commission to take into account the non-profit character of the

point is what rates educational program providers, both those with and without funding, are able to pay. If maximum prices are set too high, the purpose of §335 will be frustrated.[38] CFA believes it is consistent with the public interest and Congressional intent as expressed at §335(b)(4)(A), for a wide variety of noncommercial educational entities to be able to lease time. This should include both large and small entities and those with and without federal funding.

Given this context, the Commission should determine reasonable pricing taking into account the resources of the noncommercial educational lessee. CFA believes the Commission has the authority to create a price system where large, well-funded organizations should pay more than smaller entities. Small entities should pay increasing amounts as they grow, and as the DBS audience grows, up to the statutory ceiling. Amounts for part-time usage would be pro-rated from full time rates.

There are substantial risks entailed in requiring all noncommercial educational programmers to pay initial rates at or near the statutory maximum. First, the advent of educational service could be delayed.[39] Second, high maximum rates could,

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[38]Congress certainly did not intend to use §335 as a way to maximize revenues for the DBS operator, since they set pricing below cost.

[39]DBS operators may not find it to their advantage to fill noncommercial educational channels through voluntary low rates, given that §335(b)(2) permits them to use vacant educational

in effect, allow the DBS operator to select educational leasees. The operator would have the discretion to deter most educators by charging them the maximum, while supplying lower rates to favored programmers. As discussed at section V. *supra*, CFA believes that allowing the DBS operator to select noncommercial educational programmers is inconsistent with §335(b)(3), which states that the provider of DBS service shall exercise no editorial control over programming provided pursuant to this section.

B. Maximum Rates

In calculating maximum rates, the Act places strict limits on what costs can be included in calculating the 50% of direct costs rate ceiling.[40] All indirect costs are excluded from the calculation. CFA believes costs associated with technical interfaces are relevant to calculating the rate for noncommercial educational programmers. Joint and common costs should not be considered in calculating direct costs.

CFA advocates applying the same analysis for calculating direct costs of DBS as for Title II regulatory proceedings and distinguished from fully allocated costs. It is appropriate to include only those costs directly identified as necessary to incur to permit a DBS operator to offer and administer the

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capacity for commercial purposes.

[40] § 335(4).